CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 585

LEVY RICE MILLING CO., INC., PETITIONER,

vs.

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 14, 1935.

CERTIORARI GRANTED NOVEMBER 25, 1935.

SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA.

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION.

No. 326 (In Equity).

LEVY RICE MILLING COMPANY, INC.,

versus

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA.

Appearances:

Messrs. Merrick, Schwarz, Guste, Barnett & Redmann, Attorneys for Levy Rice Milling Co., Inc., Plaintiff-Appellant.

Rene A. Viosca, Esq., United States Attorney, and Robert Weinstein, Assistant United States Attorney, appearing on behalf of Rufus W. Fontenot, Individually and as Acting Collector of Internal Revenue for the District of Louisiana, Defendant-Appellee.

APPEAL from the District Court of the United States for the Eastern District of Louisiana to the United States Circuit Court of Appeals for the Fifth Circuit, returnable within thirty (30) days from the 29th day of October, 1935, at the City of New Orleans, Louisiana.

TRANSCRIPT OF RECORD.

BILL OF COMPLAINT.

Filed Oct. 28, 1935.

United States District Court for the Eastern District of Louisiana.

Number 326 In Equity.

Levy Rice Milling Company, Inc.,
vs.
Rufus W. Fontenot, Individually and as Acting Collector of Internal Revenue.

Petition.

Filed ....,Deputy Clerk.

To the Honorable Wayne G. Borah, Judge of the District Court of the United States in and for the Eastern District of Louisiana, New Orleans Division:

The petition of Levy Rice Milling Company, Inc., with respect, represents:

I.

That petitioner is a corporation created and existing under the laws of the State of Louisiana, with its domicile in the City of New Orleans within the Eastern District of Louisiana.

II.

That Rufus W. Fontenot, hereinafter called "Respondent," is a citizen of the State of Louisiana and residing in the City of New Orleans, within the Eastern District of Louisiana, and is the Acting United States

Collector of Internal Revenue for the State of Louisiana.

III.

This is a suit in which the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars and arises under the Constitution and laws of the United States, and in which the plaintiff seeks to enjoin the Acting Collector of Internal Revenue from unlawfully collecting processing taxes, in accordance with the provisions of certain Acts of Congress, which are violative of the Constitution of the United States.

IV.

Plaintiff is, and at all the times hereinafter mentioned was, engaged in the business of milling rice in its own rice mill, located in the City of New Orleans, State of Louisiana.

V.

The Agricultural Adjustment Act, Chapter 25, Title 1, 48 Stats. 31, as amended, and more particularly Sections 9 and 16 thereof, and the Regulations and proclamations of the Secretary of Agriculture of the United States and orders of the Secretary of the Treasury of the United States made and issued pursuant to the provisions of the said Act of Congress, purport to impose, levy and assess against plaintiff so-called "processing taxes" in the aggregate amount of $17,721.23 on account of rice milled by the plaintiff during the month of September, 1935.

VI.

Under the provisions of the said Act of Congress, as amended, and the Regulations of the Secretary of Agri-

culture and the Secretary of the Treasury, made and issued pursuant thereto, petitioner must file with the respondent Acting Collector of Internal Revenue, on or before the last day of October, 1935, a return showing the amount of rice processed during the month of September, 1935, by petitioner and the amount of tax due thereon, and accompany the same with remittance of the amount of processing taxes on account of rice processed by the petitioner during the month covered by the return. It is the duty of the respondent, as Acting Collector of Internal Revenue, to collect the taxes imposed, as hereinabove set forth, together with interest thereon at the rate of one (1%) percent per month for failure to pay the tax when due. Should plaintiff fail to make remittance of the tax at the time specified for filing the return, the respondent, as Acting Collector of Internal Revenue, is bound under the statute and the Regulations to assess the same, notify petitioner of said assessment, and, upon petitioner's failure to pay the said tax and interest within ten (10) days from receipt of said notice, an additional penalty of five (5%) percent is imposed by the statute and Regulations. Should petitioner fail to pay the taxes and interest within ten (10) days of receipt of said notice, the respondent, as Acting Collector of Internal Revenue, will enforce collection of the said taxes, interest and penalties by filing notice of lien against all of petitioner's properties and by distraining upon and selling plaintiff's property to the extent necessary to enable the respondent to realize in full the amount of the said taxes, interest and penalties. The petitioner is actively engaged in the operation of its said rice mill and taxes under the said Act of Congress will continue to accrue on the last day of each month, and, upon plaintiff's failure to pay the said taxes, repeated distraints will be issued against petitioner's property to petitioner's irreparable damage and loss. For the reasons hereinafter stated, petitioner has no adequate remedy at law in the premises.

VII.

Petitioner shows that its said business of milling rice is conducted wholly and entirely within the State of Louisiana, wherein its said rice mill is located, and that said milling is wholly and entirely an intrastate business.

VIII.

Petitioner shows that the said Agricultural Adjustment Act, as amended, insofar as it provides for the levy, assessment and collection of processing taxes upon rice processed by this petitioner, is illegal and violative of the Constitution of the United States, more particularly as follows:

(a) The said exactions herein referred to as processing taxes are not authorized by Article I, Section 8, Clause 3 of the Constitution of the United States regulating interstate and foreign commerce, for the reason that the production and processing of rice, and more particularly the business of processing rice as conducted by this petitioner, are not interstate commerce, but, on the contrary, both the production and processing of rice is wholly an intrastate business.

(b) The said exactions called "processing taxes" by the statute are not imposed under Section 8 of Article I of the Constitution, but are imposed for the purpose of regulating and restricting the production of rice in the several states, which is an unwarranted interference with the powers reserved to the states under the Tenth Amendment and, therefore, does not constitute an exercise of the Federal taxing power.

(c) The said Act, and more particularly Sections 8 and 9 thereof, is an unwarranted and unconstitutional delegation to the Secretary of Agriculture of the legis-

lative power granted exclusively to Congress by Article I, Section 1 of the Constitution of the United States, in that it delegates to the Secretary of Agriculture the power to determine by agreement with producers which of the commodities enumerated under Section 11 of the Act, as amended, shall be restricted as to production, to what extent the acreage devoted to production of any of such commodities shall be limited to bring about the result sought to be gained by the Act, to determine when rental or benefit payments shall be made and the amount, when and what competing commodity should be taxed and to what extent, when such processing tax shall become effective or shall cease to be imposed; all of which are the exercise of legislative powers conferred exclusively on Congress by Article I, Section 1, Article I, Section 8, clause 18, Article II, Section 1, Article I, Section 7, clause 1, and Article I, Section 9, clause 7 of the Constitution of the United States.

(d) The collection of the said exactions, said so-called processing taxes, as to the petitioner herein, would constitute the taking of petitioner's property without due process of law and not for a public purpose but for the benefit of a specific class of individuals, without just compensation to petitioner, and in that respect is violative of the Fifth Amendment to the Constitution of the United States, since the said exactions are imposed on the face of the statute for the benefit of the producers of rice.

(e) The said exactions imposed by the statute under the name of "processing taxes," if at all taxes within the intendment of the Constitution, are direct taxes and are not apportioned as required under Section 8 of Article I of the Constitution, or, if excise taxes, are not uniform throughout the United States and, therefore, violative of Article I, Section 8, Clause 1 of the Constitution of the United States.

IX.

Section 21 (d) of the said Agricultural Adjustment Act (as amended, which amendment was approved August 24, 1935) provides that no recovery shall be made or allowed of any tax, penalty or interest collected under the Agricultural Adjustment Act, unless it shall be established to the satisfaction of the Commissioner of Internal Revenue that neither the claimant nor any person directly or indirectly under his control, or having control over him, has directly or indirectly included such amount in the price of the article in respect to which it was imposed, or any article processed from the commodity in respect to which it was imposed, or passed on any part of such amount to the vendee, or to any other person in any manner, or included any part of such amount in the charge or fees for processing, and that the price paid by the claimant to such person was not reduced by any part of such amount.

Petitioner avers that said provision of the Act imposes an undue and impossible burden of proof as a condition precedent to recovery of any processing tax paid, and, therefore, the apparent remedy afforded by the Statute is wholly inadequate, and is, in fact, no remedy at all.

Petitioner shows that it is impossible for petitioner, or any other rice miller, to produce the evidence required by this provision of the Act for the following reasons:

(a) Rough rice and clean rice, and the by-products of rice milling, namely, polish, bran and hulls, are bought and sold on a competitive basis;

(b) While the price of rough rice is affected by the market price of clean rice at any given time, the

price of both fluctuates, and since several months elapse between the purchase by the miller of rough rice, and the sale by the miller of the same rice after being milled, and its by-products, it is impossible for the miller to know at the time he purchases rough rice whether he will make a profit, or sustain a loss on the rice purchased.

(c) Furthermore, rice is sold in competition with other food commodities, and as a consequence, its market value is affected by the market value, from time to time, of other food commodities sold in competition with rice.

(d) From the nature of the commodity and of the process of milling, rough rice when milled produces different grades and qualities of clean rice, of varying market value, and also produces different kinds of by-products of varying values;

(e) The overhead and milling expense of rice mills vary, depending upon location, management and other factors, which results in differences of gains made or losses sustained by the respective mills;

(f) The processing tax accrues and is payable on the rice processed during any given month, at the end of the succeeding calendar month; but the said rice, of varying grades and values, and its by-products of different classes and values, are sold from time to time at different prices, depending upon the market from time to time, and the same grade from rice processed during different months and purchased at different prices may and frequently is sold in one lot at the same price.

(g) Because of the foregoing and of other factors inherent in the nature of the business, while taxation is bound to be a factor affecting the competitive and

fluctuating market value of rough rice and of clean rice and its by-products and, therefore, can be said to some extent to have been taken into consideration in the purchase of rough rice and in the sale of clean rice and its by-products, it is absolutely impossible to say as to any given lot of rice processed in any given month, whether any or a part, or if a part, what part, of the so-called processing taxes has been either passed back to the producer or passed on to the purchaser of the clean rice and its by-products.

Said Section 21 (d) of the Act, therefore, provides a condition precedent to recovery of the tax paid, even though same should be finally declared to have been illegally collected, which condition precedent is absolutely impossible of performance.

X.

Section 21 (d) of the said Act further requires that this well-nigh impossible condition precedent to recovery of taxes paid by petitioner must be established to the satisfaction of the Commission of Internal Revenue, thus making the Commissioner of Internal Revenue the trier of the facts involved and allowing recourse to the Courts upon denial of relief by the Commissioner, only upon the record made up before the Commissioner. Therefore, on such recourse to the Courts, in order to allow a recovery, the Court would have to find that there was no evidence whatever in the record to sustain the Commissioner's finding. For this reason, said Section 21 (d) deprives petitioner of its property without due process of law and is, therefore, violative of the Fifth Amendment to the Constitution of the United States.

XI.

Section 21 (a) of the said Act (amendment of August 24, 1935) provides that no suit shall be brought

or maintained in any Court, if such suit is for the purpose of obtaining a Declaratory Judgment under the Federal Declaratory Judgments Act, in connection with any such tax or such amount of any such interest or penalty.

Petitioner, therefore, for the reasons above stated, cannot obtain any refund under the provisions of Section 21 (d) and cannot obtain any Declaratory Judgment by reason of the provisions of Section 21 (a) and is, therefore, completely and wholly without any adequate legal remedy in the premises.

XII.

Said Section 21 (a) further prohibits suits to enjoin the collection of any taxes imposed by said Act. Petitioner shows that the extraordinary and exceptional circumstances hereinabove set forth renders the said provisions of the Act inapplicable to the situation here presented.

XIII.

A further ground for the equity jurisdiction of this Court and of the inadequacy of the legal remedy provided by Section 21 (d) of the Act is that your petitioner would be relegated to seeking its remedy by a multiplicity of claims and suits for refund of the taxes paid.

XIV.

Should the injunctive relief hereinafter prayed for be granted, petitioner will continue to make and file with the respondent, as Acting Collector of Internal Revenue, the monthly returns of the tax and will deposit the amount of such taxes, at the times that said

taxes are made payable by the statute and the Regulations thereunder, with such Depositary as the Court may direct, the amounts thus deposited to remain so deposited subject to the further orders of this Court.

Wherefore, your petitioner prays for equitable relief, as follows:

1. That a Writ of Subpoena may be issued out of and under the seal of this Honorable Court, directed to the said respondent, Rufus W. Fontenot, individually, and as Acting Collector of Internal Revenue for the District of Louisiana, requiring him to appear on a day certain before this Court, and then and there full, true, direct and perfect answer make to all and singular the allegations contained in the foregoing petition, but not under oath (answer under oath being hereby expressly waived), and to perform and abide by such further orders, directions and decrees herein as this Honorable Court shall deem meet and proper.

2. That this Court will issue a temporary restraining order herein, enjoining and restraining the respondent from assessing or collecting, or attempting to assess or collect from petitioner herein, in any manner whatsoever, any processing taxes, and any interest or penalty, imposed by the said Agricultural Adjustment Act, and at the convenience of the Court, and in accordance with law, will fix a time for hearing on this application for a Preliminary Injunction, and that notice of said hearing shall be served upon said respondent; and upon said hearing a Preliminary Injunction be issued, enjoining and restraining the respondent from assessing or collecting from petitioner any processing taxes, interest or penalties imposed by said Agricultural Adjustment Act.

3. That after all due proceedings had, said Preliminary Injunction be made permanent, and the said

Agricultural Adjustment Act, insofar as it provides for the levying, assessment and collection of said processing taxes against and from petitioner be decreed illegal, invalid and unconstitutional.

Petitioner further prays that upon the granting of said Preliminary Injunction, the Court authorize and direct petitioner to deposit, from month to month, the amount of said taxes, as they accrue and are payable, with such Depositary as the Court may select, and subject to the further orders of this Court.

Petitioner prays for such further orders, decrees and relief as equity, law and the nature of the cause may require.

LEVY RICE MILLING COMPANY, INC.,
By JAKE LEVY, President,
RALPH J. SCHWARZ,
MORRIS B. REDMANN,
Solicitors.

State of Louisiana,
Parish of Orleans. ss.

Before me, the undersigned authority, a Notary Public duly commissioned and qualified in and for the above Parish and State, personally came and appeared Jake Levy, who being first duly sworn, deposes and says:

That he is the President of Levy Rice Milling Company, Inc., petitioner in the foregoing petition, and that all the allegations therein made are true and correct.

(Sgd.) JAKE LEVY.

Sworn to and subscribed before me, at New Orleans, Louisiana, this 28th day of October, 1935.

(Sgd.) MORRIS B. REDMANN,
Notary Public.

RETURN TO RULE TO SHOW CAUSE.

Filed Oct. 28, 1935.

In the District Court of the United States for the Eastern District of Louisiana, New Orleans Division.

No. 326 (In Equity).

Levy Rice Milling Company, Inc.;
versus
Rufus W. Fontenot, Individually and as Acting Collector of Internal Revenue.

To the Honorable, the Judge of the District Court of the United States in and for the Eastern District of Louisiana:

Now into Court comes Rufus W. Fontenot, Acting Collector of Internal Revenue, defendant in the above entitled and numbered cause, through Rene A. Viosca, United States Attorney in and for the Eastern District of Louisiana, and Robert Weinstein, Assistant United States Attorney for said District, his attorneys, and by virtue of the rules and practice of this Court requiring the defendant in rule to file all defenses to the rule on the date set for the hearing on the application for a temporary injunction, and with full reservation of all of his rights under the pleadings in this cause, answers the rule by stating that for lack of sufficient information to justify a belief he denies all of the allegations of paragraph one, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen and fourteen of the bill of complaint, but admits the allegations of paragraph two of the said bill.

Your respondent further avers that the proceedings should be dismissed for the reasons that this Honorable Court has no jurisdiction and that the Agricultu-

ral Adjustment Act is constitutional, valid and enforceable.

Wherefore, your respondent prays this Honorable Court to dismiss the Bill of Complaint at complainant's costs and to refuse granting any injunction in these proceedings, and for all general and equitable relief.

(Signed) RENE A. VIOSCA,
United States Attorney,
(Signed) ROBERT WEINSTEIN,
Asst. United States Attorney.

VERIFICATION.

State of Louisiana,
Parish of Orleans.

Before me, the undersigned authority, personally came Rene A. Viosca, who is the United States Attorney for the Eastern District of Louisiana, who in his oath says: That in his aforesaid official capacity he is of counsel for defendant in the above case; that he has drawn the return to the rule to show cause and that all the allegations of fact therein are true and correct to the best of his knowledge, information and belief.

(Signed) RENE A. VIOSCA.

Sworn to and subscribed before me this 28th day of October, 1935.

(Signed) CLAUDE D. SHAW,
Deputy Clerk, U. S. District Court, Eastern District of Louisiana.

MOTION TO DISMISS.

Filed October 28, 1935.

In the District Court of the United States for the Eastern District of Louisiana, New Orleans Division.

No. 326 (In Equity).

Levy Rice Milling Company, Inc.,
versus
Rufus W. Fontenot, Individually and as Acting Collector of Internal Revenue.

To the Honorable, the Judge of the District Court of the United States in and for the Eastern District of Louisiana:

Comes now, Rufus W. Fontenot, Acting Collector of Internal Revenue, defendant in the above entitled and numbered cause, by Rene A. Viosca, United States Attorney in and for the Eastern District of Louisiana, and Robert Weinstein, Assistant United States Attorney for said District, his attorneys, with full reservation of his rights to further plead in this cause, and moves the Court to dismiss the Bill of Complaint filed herein, with costs to be paid by the complainant upon the following grounds and for the following reasons:

I.

That this Court is without jurisdiction to restrain or enjoin the collection of taxes herein involved, or to hear and/or determine the issues presented by said Bill of Complaint because:

1. Section 3224 of the Revised Statutes of the United States prohibits the maintaining in any Court

of a suit for the purpose of restraining the assessment and/or collection of a Federal Tax.

2. Section 21-A of the Agricultural Adjustment Act, as amended, prohibits the maintaining in any Court of a suit for the purpose of restraining the assessment and/or collection of any processing tax under the said Agricultural Adjustment Act.

3. The bill of complaint sets forth no facts which, if true, would entitle complainant to the relief prayed for in a Court of Equity.

4. Complainant has a plain, adequate and complete remedy in the ordinary course of law.

(Signed) RENE A. VIOSCA,
United States Attorney,
(Signed) ROBERT WEINSTEIN,
Asst. United States Attorney.

ORDER OF COURT CONSOLIDATING ALL CASES FOR TRIAL, ETC.

Filed Oct. 28, 1935.

United States District Court, Eastern District of Louisiana, New Orleans Division.

Docket No. 321—In Equity:

Rickert Rice Mills, Inc.,
versus
Rufus W. Fontenot, Individually and as Acting Collector of Internal Revenue.

Docket No. 322—In Equity:

A. B. Dore, doing business under the name of The Dore Rice Mill,
versus
Rufus W. Fontenot, Individually and as Acting Collector of Internal Revenue.

Docket No. 323—In Equity:

United Rice Milling Products Co., Inc.,
versus
Rufus W. Fontenot, Individually and as Acting Collector of Internal Revenue.

Docket No. 324—In Equity:

Baton Rouge Rice Mill, Inc.,
versus
Rufus W. Fontenot, Individually and as Acting Collector of Internal Revenue.

Docket No. 325—In Equity:

T. Simon
versus
Rufus W. Fontenot, Individually and as Acting Collector of Internal Revenue.

Docket No. 326—In Equity:

Levy Rice Milling Company, Inc.,
versus
Rufus W. Fontenot, Individually and as Acting Collector of Internal Revenue.

Docket No. 327—In Equity:

Farmers Rice Milling Company, Inc.,
versus
Rufus W. Fontenot, Individually and as Acting Collector of Internal Revenue.

Docket No. 328—In Equity:

Noble-Trotter Rice Milling Co., Inc.,
versus
Rufus W. Fontenot, Individually and as Acting Collector of Internal Revenue.

Considering the stipulation and agreement of counsel for all parties made this day in open Court;

It is Ordered that the above numbered and entitled cases be and they are hereby consolidated for the purpose of trial and that the affidavits and evidence offered in one case be considered to apply to all.

(Signed) JOHN McDUFFIE, Judge.

New Orleans, Louisiana, October 28, 1935.

State of Louisiana,
Parish of Orleans.

Before me, the undersigned authority, on this day personally appeared W. M. Reid, known to me, who being by me first duly sworn in terms of law deposed and said on his oath as follows:

My name is W. M. Reid. I reside in New Orleans, Louisiana, and am Executive Secretary of the Rice Millers' Association. My principal duties are the

preparation and interpretation of statistical and economic data with regard to the rice milling industry. I have been engaged in the rice milling business since 1909, and from 1916 to 1928, I personally operated a rice mill. I am thoroughly familiar with the rice milling industry in all of its phases.

I have read all of the allegations contained in Section 12 of Plaintiff's bill of complaint and Equity 321, Rickert Rice Milling Company vs. Rufus W. Fontenot, Equity 322, A. B. Dore vs. Rufus W. Fontenot, Equity 323, United Rice Milling Products Company, Inc., vs. Rufus W. Fontenot and companion cases, and all of such allegations are true and correct in every respect.

It is true that rice millers, when they purchase rough rice, consider the fact that they will have to pay a processing tax on the milling of such rough rice. However, this is simply one of the many factors entering into the miller's determination of what he ought to pay for rough rice. As a practical matter, when the rice miller negotiates for the purchase of a given lot of rice, he first estimates what he believes he could get for such rice after milling on the existing market for clean rice and rice products. He then estimates what he thinks it will cost him to process the rough rice into its various grades and products, and in this estimate is included the amount of the processing tax, as well as other taxes. Having made these estimates, he determines what he ought to pay for the rough rice. However this is not necessarily what he does pay, because each individual miller is buying in competition with other millers. Thus, if other millers are paying more than he thinks he ought to pay, he has to meet the price the others are paying, if he is to get any rice. No individual miller makes the rough rice market. It is a market made of the composite purchasing of all millers in the particular territory. While the estimates above referred to are made with regard to the market for clean

rice and rice products at the time of the purchase of the rough rice, that market, however, does not necessarily control since rough rice is not ordinarily milled, and the clean rice and products sold until several months after the purchase of the rough rice.

Since the market for clean rice and rice products fluctuates from day to day and month to month, the prospects of the future market has a bearing on what the miller may have to pay for rough rice. Optimism with reference to the future market for clean rice on the part of a sufficient number of rice millers will force up the market for rough rice, and all millers will have to meet the increased price of rough rice (if they are to have any rice at all), even though some of them may be pessimistic as to the future market.

For example, the present market price of rough rice is quite high with reference to the present market price for clean rice and rice products. In other words, using the estimates above referred to, the cost of rough rice on today's market plus estimated cost of milling (including the processing tax) is more than the miller could reasonably expect to procure for the rice and rice products made from such rough rice on the existing market for clean rice and rice products. This present day market for rough rice is not made by any individual miller, but is made by the composite of purchases by all millers in the territory. Thus, as I have previously said, while the processing tax is considered by the miller in determining what he ought to pay for rough rice, it is simply one of many factors entering into such determination, and is by no means controlling.

Furthermore, it is impossible to tell on any given purchase of rough rice how much, if at all, that price has been affected by the existence of the processing tax.

I am familiar with accounting and statistical methods, and I know of no possible method of keeping books and records in the rice business which would

accurately reflect the gain or loss from the purchase, milling and sale of any given lot of rice as distinguished from the gain or loss from the aggregate of all transactions during a season. A profit or loss, however, may be estimated at any given time by the use of averages, predictions and arbitraries.

The rice milling business is seasonal; the season beginning on August 1st and ending on July 31st, the operations gradually increasing until the peak is reached during the months of October, November and December, and decreasing to the end of the season. For this reason as well as others, the cost of milling varies greatly from time to time during the season. The estimated cost of milling which millers use in budgeting and determining what they want to pay for rough rice is arrived at by averaging the cost of the entire season so that this factor, when used to estimate a profit or loss on a given transaction, could never be exact, and might be very much too high or very much too low when applied to that particular transaction.

Under these circumstances, when a miller purchases a particular lot of rice, he may believe that all, or a part of the processing tax to be assessed on such rice will be absorbed by the farmer. On the other hand, he may believe that all, or a part of such tax will be absorbed by himself. However, he can never even know, much less prove, even after all the clean rice and rice products made from the particular lot of rough rice has been sold, whether he, or the farmer, or the purchaser, or all of them together has borne the ultimate economic burden of the tax. This is because any belief he may have had as to whether the burden of the tax would fall, must of necessity, have been based in part on estimates, which are in turn, based on averages, which are never accurate with respect to any given lot of rice. In addition, such belief must also be based in part on assumptions as to market conditions on clean rice and rice products, which may

or may not be correct. The rough rice may go through the mill on a day when large amounts are being milled, and the cost per unit is lower than the average; or, it might go through on a day when little rice was being milled resulting in a unit cost higher than the average; or, it might go through partly on one kind of a day, and partly on another. Furthermore, the rice may not mill out what he expected, even if the market on clean rice and rice products remains the same. And, in addition, the price at which he eventually sells the clean rice and rice products may be substantially less or substantially more than the sale price on which he based his presumptions.

There is no necessary relation between the market for clean rice and for rice products, since they are sold for different purposes, and this is an added reason why the miller cannot possibly allocate the cost of a given lot of rough rice among the clean rice and rice products produced from it.

For example, it is entirely possible for the market on bran or hulls to be relatively high, while the market on the various grades of head rice is relatively low.

The rough rice market is affected by the clean rice and rice products market and vice versa, but it is as impossible to determine their relative affect on each other as it is to determine whether the hen or the egg came first. I know of no way of determining what either the rough rice or clean rice marked would be if there were no processing tax. I do know, however, that the individual miller cannot force down the price paid to the farmer for rough rice because of the tax, and thus force the farmer to pay all, or a part of the burden of the tax. The individual miller simply pays the market price for rough rice which has been fixed by the composite action of all millers, and it would be impossible to prove whether a lowering of the rough rice market was the result of the assessment of the tax, or whether it was caused by other factors, such as a drop in time clean rice and rice products

market, a composite pessimism on the part of rice millers as to the future market or other factors. The same thing is true with regard to the market for clean rice and rice products, and no individual miller can arbitrarily force that market upwards in order to pass on the tax.

(Sgd.) W. M. REID.

Sworn and subscribed to before me, the undersigned authority, this 28 day of October, 1935.

(Sgd.) HARRY R. CABRAL,
(Seal) Notary Public.

State of Texas,
County of Harris.

Before me, the undersigned authority, on this day personally appeared Homer L. Bruce, who, having been by me duly sworn, stated on oath as follows:

He lives in Houston, Harris County, Texas, and is duly licensed and practicing attorney at law. He is familiar with the bills of complaint that are being presented to the United States District Court at New Orleans, Louisiana, on behalf of certain rice millers of Louisiana seeking an injunction against the collection of processing taxes on rice, having worked with his partner Mr. John P. Bullington in the preparation of said bills of complaint, and is familiar with the general practice of the rice industry of selling rice on samples and the filling of orders for clean rice by mixing rice from different lots of clean rice in the manner set out in the bills of complaint.

This affidavit is made in connection with the allegations in said bills that it is impossible for the plaintiff rice millers to comply with the requirements of Section 21 (d) of the Agricultural Adjustment Act that they

shall establish that no part of the processing tax has been passed on to the consumer or taken out of the price paid the producer before they are allowed to recover any processing taxes paid.

Section 8 (3) of the Agricultural Adjustment Act gave the Secretary of Agriculture authority to issue licenses to processors, including processors of rice, and provided that the Secretary should have the right to revoke any license for violations of its terms. Section 8 (2) of the same Act authorized the Secretary to enter into marketing agreements with processors.

In the fall of 1933, the Secretary entered into a marketing agreement with members of the southern rice milling industry, and at the same time issued a license applicable to all mills. This marketing agreement and the license were in substantially the same form. Later various amendments were made to both the marketing agreement and the license.

In the marketing agreement and in the license, the Secretary of Agriculture fixed the price to be paid to farmers for rough rice, these prices being set out in Article III of the marketing agreement and license hereinafter referred to, namely, the one effective on July 21, 1934. Article IV, Section 1 of the license effective July 21, 1934, set out the minimum price that millers might sell clean rice for in the domestic market and that section is as follows:

"Section 1. To effectuate the purposes of this Amended license and to aid in the carrying out and enforcement of the provisions hereof, no miller shall offer for sale, sell or deliver for domestic consumption any quantity of clean rice for an amount per pocket less than the sum of

(a) the minimum price, determined pursuant to article III and Schedule 1, for the grade, variety and quantity of the rough rice from which such clean rice was milled,

(b) the conversion charge for such quantity of rough rice and prevailing at the time of such offer, sale or delivery, and

(c) the published car lot rail rate for transporting such rough rice from the customary point of delivery to the miller's mill, and

(d) the administrative assessment for such quantity of rough rice and prevailing when such rice was milled;

Provided, however, that any miller may offer clean rice for sale for export to foreign countries, on the foregoing basis less a maximum discount of 20 cents per barrel of such rough rice and may, if the rice is actually exported, sell or deliver clean rice for export to foreign countries on said basis less said maximum discount. The determination of the Millers Committee as to whether or not clean rice is actually exported shall be final and conclusive, subject to appeal to the Secretary. Said minimum amounts, below which this section provides that clean rice shall not be offered for sale, sold, or delivered by a miller, apply f. o. b. the miller's mill.

Sec. 2. The conversion charge per barrel of rough rice shall, until and except as changed by the Secretary, be an amount equal to the sum of (a) seventy (70) cents per barrel of rough rice, (b) nine (9) cents per barrel of rough rice if standard one-hundred pound single packages are used for the clean rice, and (c) if cotton or paper inner linings or regular burlap outer slips are used for the clean rice, an additional five (5) cents per barrel of rough rice, or (d) if any other type of container is used for the clean rice, the actual invoice price for the container used. The Secretary may at any time and from time to time during the effective period, increase or decrease the amount of, and/or

change the basis of computation of, the conversion charge."

One of the main purposes, if not actually the main purpose, of the Agricultural Adjustment Act and this license was to increase the price of rough rice paid the farmer, and in order to keep the rough rice price at a higher level, the Secretary attempted by this Section 1 to fix the price that clean rice might be sold at as roughly 79¢ per barrel above the cost of the rough rice. It was extremely important to keep the clean rice up to this level in order to maintain the rough rice price. In the fall of 1934, the Secretary of Agriculture brought proceedings, according to the information and belief of the affiant, against a number of different rice mills in Louisiana and to affiant's knowledge against Bay City Rice Mills of Bay City, Texas, a partnership composed of W. M. Loving and three other partners. The case against the Bay City Mills was case No. 11-1-7, entitled In the Matter of W. M. Loving, R. Q. Pegram, S. M. Clements and L. D. Clements, Individually and as Co-partners trading under the name Bay City Rice Mills. One of the original charges against the Bay City Rice Mills was Charge No. 11, which charged in general terms that the Mill had sold clean rice for domestic consumption for an amount less than the price fixed for the sale of the clean rice pursuant to this license. This Charge 11 was later made more specific as follows:

"11. That the said Licensee since the effective date of said License has violated Section 1 of Article V of said License as in effect until July 21, 1934, 12:01 A. M. Eastern Standard Time, and Section 1 of Article IV of said License as in effect from July 21, 1934, 12:01 A. M. Eastern Standard Time on, in that said Licensee has offered for sale, sold and delivered, for domestic consumption, quantities of clean rice, to-wit: Clean

rice lot numbered 36 on the books of the respondent derived from rough rice lot numbered 33 on the books of the respondent and purchased from C. E. Everitt; clean rice lot numbered 43 on the books of the respondent derived from rough rice lot number 33 on the books of the respondent and purchased from C. E. Everitt; clean rice lot numbered 123 on the books of the respondent derived from rough rice lot numbered 153 on the books of the respondent and purchased from A. P. Powers clean rice lot numbered 124 on the books of the respondent derived from rough rice lot numbered 154 on the books of the respondent and purchased from J. R. Reed; for an amount per pocket less than the price fixed for the sale of such clean rice pursuant to said Section 1 of Article V of said License as in effect up until July 21, 1934, 12:01 A. M. Eastern Standard Time, and pursuant to said Section 1 of Article IV of said License as in effect from July 21, 1934, 12:01 A. M. Eastern Standard Time on."

The affiant, together with Mr. W. E. Davant of Bay City, Texas, represented the Bay City Rice Mills in this hearing before the representatives of the Secretary of Agriculture on these charges, which hearing was held in Houston, Texas, and again on December 27, 1934, and ran through January 2, 1935.

The Bay City Rice Mills in that proceeding took the position, and so advised the Secretary of Agriculture's representatives, that it was utterly impossible, owing to the manner in which the rice industry is conducted, through the sale of clean rice on samples made up of mixes of different lots of clean rice, as more fully set out in the bills of complaint presented to the United States District Court at New Orleans in the processing tax suits, to determine in the case of any lot of rice, whether the clean rice had been sold for 79¢ more than the rough rice had cost. or for the amount above the cost of the clean rice that the Secretary required under Section 1 of Article IV.

The Secretary of Agriculture's representatives had access to all the books, vouchers and records of the Bay City Rice Mills, both in connection with its rough rice purchases and its clean rice sales and had several auditors continuously working on those records. The amount paid for the rough rice purchased from Evoritt, Powers and Reed, as set forth in said Charge II was established. The clean rice derived from the rough rice purchased from these three producers was traced at the hearing into the sales of clean rice into which they entered and the price of clean rice sales was established. However, owing to the fact that each quantity of clean rice that went into a sale was made up of a mixture from various lots of clean rice, which were in turn produced from various lots of rough rice bought from different producers, and owing to the fact that there was, as is usual in the rice business, an almost infinite variation in the combinations of these mixes of clean rice lots, and owing to the fact that rough rice when milled produces different grades of clean rice, as set forth in the above mentioned bills of complaint, the Secretary of Agriculture was never able to show in that case whether or not the Bay City Rice Mills had obtained for the clean rice derived from the Evoritt, Powers, and Reed rough rice the amount (roughly 79c) above the cost of the rough rice that Article IV, Section 1, attempted to require the mill to get. Although that was one of the charges most vitally affecting the entire rice program in affiant's belief, and although the Secretary of Agriculture through his two attorneys who prosecuted the case and through his several auditors who were continuously working on the records of the Bay City Mills made every effort to prove the charge, the Secretary of Agriculture in his findings did not find that the charge had been proven and did not find that the Bay City Rice Mills had violated the license in the manner set forth in Charge 11.

Affiant believes, and on that belief states, that the reason the Secretary of Agriculture did not find that Charge 11 had been supported by any evidence was because it was utterly impossible practically to show whether clean rice had been sold for the amount above the rough rice cost that the license required.

The charge referred specifically to the sale of clean rice lots 36, 43, 123 and 124. Evidence as to the history of those clean rice lots is as set out below.

The clean rice in each case was included in various sales, each sale being represented by a separate invoice. The history of those clean rice lots was as follows: (As shown by the record in that case.)

Clean Rice Lot 36:

This rice came from rough rice lot 33 from C. E. Everitt. It was mixed with various other lots of rice and went in as a part of the rice sold and represented by the following 9 invoices: Invoice Nos. 6615, 6622, 6634, 6639, 6645, 6767, 6770, 6771 and T-162 (R. 324-326).

The rice covered by invoice No. 6615 was made up of rice from various lots as follows:

39 pockets from lot 17, fancy
125 pockets from lot 31, fancy
200 pockets from lot 36, fancy
26 pockets from lot 33, heads
26 pockets from lot 31, heads
(R. 472.)

Invoice 6622 consisted of the following:

75 pockets from lot 26, fancy
250 pockets from lot 35, fancy
175 pockets from lot 36, fancy
(R. 475.)

Invoice 6634 consisted of the following:

148 pockets from lot 34 EP
75 pockets from lot 35 EP
75 pockets from lot 36 EP
81 pockets from lot 37 EP
68 pockets from lot 38 EP
150 pockets from lot 43 EP
201 pockets from lot 45 EP
(R. 478.)

There was no evidence whatsoever as to the different lots going to make up the rice on any of the other invoices heretofore or hereafter referred to, but each invoice represented a mix from various lots.

Clean Rice Lot 43:

This lot went into invoices 6634, 6639, 6644, T-126, T-127, T-128, and P-1006 (R. 327-329). No evidence was introduced as to the component part of those invoices, except invoice 6634 above set forth, but they all consisted of mixes.

Clean Rice Lot 123:

This rice went into the following invoices:

Invoices Nos. 6832, 6833, T-187, T-188, 6840, T-195, 6839. T-200, 6885, 6886, T-201, T-202, T-187, T-188, and T-182 (R. 329 et seq.). No evidence was introduced as to the lots going into these invoices but they were all mixes.

Clean Rice Lot 124:

Affiant does not have the record at this time as to what invoices this lot went into but it was mixed into a number of mixed invoices.

To have traced the cost of the various lots of clean rice that went into each invoice would have been long

involved and in fact practically impossible, and then to trace the cost of all rice going into all invoices into which any one of these clean rice lots went would have involved further and innumerable records and evidence.

This is further illustrated when it is noticed that a large number of rough rice lots and clean rice lots were involved, as, for example, in Charge 11 it referred to rough rice lot as high as No. 154 and clean rice lot as high as No. 124.

No charge was made that Bay City Rice Mills did not keep accurate and complete records of its operations.

Nor was any issue made as to the fact that the selling of rice by samples and mixing rice was usual and customary.

For example, Mr. F. A. Farda, who testified as a witness for the Secretary of Agriculture, and who is the Manager of Standard Rice Company, one of the largest rice milling companies in the United States, testified as follows:

"Mr. Farda:

Well, it is not common practice, in fact, it is not a practice to make a mixture just in order to put it in a warehouse and keep it. You make the mixture when you sell your rice, get ready to sell it, you sell it on a sample and then you make your composite mixture and your lots match your sample. *That is a common practice.*

"Mr. Davant:

Is it not a practice to make up these samples practically in the beginning of the season and to send them out as types?

"Mr. Farda:

The practice is to make hand mixes, and to send them samples, and when you sell on the samples you make your actual mixture, make it up." (R. 420-421.)

* * * *

"Mr. Farda:

The usual practice is, you don't make your mix until you have the rice sold." (R. 429-430.)

* * * *

"Mr. Farda:

You never make a mix until you have a sale made, because it would not be of material advantage to do so because you may not find another market for that particular blend that you make. *You therefore keep your rice in the original lots* to be in a position to make a blend of whatever the trade or market requires at that time." (R. 430.)

In connection with the above lots of clean rice, the Secretary's attorneys tried to make some allocation of the cost of rough rice to the different grades of clean rice produced as between fancy rice and head rice, but this was realized by all to be purely arbitrary allocation of cost without any real or sound basis for the same.

The above proceeding against Bay City Rice Mills was a proceeding before the Secretary of Agriculture to forfeit the license of Bay City Rice Mills for alleged violation of the license. The hearing was held before a representative of the Secretary of Agriculture.

In the foregoing affidavit the figure of 79c above rough rice cost has been referred to. That, as stated, was used only roughly. Under the license, the price for clean rice was to be the price fixed for rough rice plus the conversion charge plus the carload rail rate

for transporting rough rice to the miller's mill plus the administrative assessment of 5c per barrel. The conversion charge was 70c per barrel plus 9c per barrel if standard one hundred pound single packages were used for clean rice plus 5c per barrel if cotton or paper interlinings were used. This would make the spread between the rough rice price and clean rice price approximately 89c exclusive of the freight item.

(Sgd.) HOMER L. BRUCE.

Subscribed and Sworn to before me, the undersigned authority, by Homer L. Bruce, this 27th day of October, 1935.

(Sgd.) RAYMOND REILSON,
(Seal) Notary Public in and for Harris County, Texas.

AFFIDAVIT.

State of Louisiana,
Parish of Orleans.

We, L. J. Bartel, R. F. Gould, and J. J. Mayer, each first being duly sworn, deposes and says:

That we are Deputy Collectors of the Treasury Department, Internal Revenue Service, Louisiana District, working in connection with the rice processing tax division, and that the experience of each in the rice industry, prior to becoming Deputy Collectors, is as follows: L. J. Bartel has had actual experience of approximately twenty years in buying rough rice; operation of rice milling plants, and the distribution of milled rice and by-products. R. F. Gould has had actual experience as follows: Fifteen years with the largest rice millers of the industry as Office Manager, and Chief Accountant; one year as Secretary, and auditor of a rough rice buying agency for New Or-

leans rice mills, and one and one-half years as traveling auditor for the Millers Committee, an agency operating under a Marketing Agreement for the Southern Rice Industry. J. J. Mayer has had approximately seven years actual experience in buying, selling and grading rough rice and distributing milled rice, and by-products. Our broad experience, as above outlined, reveals the following facts as existing in the rice milling industry:

There is no established market price on rough rice, and the method of buying the rough rice by the millers is a competitive bidding method. Each miller has his buyer, who makes the competitive bid on the basis outlined to him by the management of the mill. The basis is as follows: Rice millers determine the price to make their bid to a producer for his rough rice based on the prevailing market price for milled rice computing the values to the different grades and by-products obtained from the processing of the rough rice being bid upon. *For example:*

A lot (parcel) of rough rice, estimated to produce (per barrel of 162 pounds) the following articles, grades, classes, etc., when processed, with estimated values as set out for each of the respective grades, classes, etc.:

Fancy Head Rice—100 pounds at 4½c	$4.50
Second Head Rice—4 pounds at 3c	.12
Screenings Rice—6 pounds at 2½c	.15
Brewers Rice—2 pounds at 2c	.04
Total yield per barrel—112 pounds.	
Total value	$4.81 plus
Approximate revenue from by-products (25c per barrel of 162 pounds)	.25
Total revenue	$5.06

Competitive bidding basis prior to the processing tax law requiring payment of a processing tax in cash: The above $5.06 is the gross value of milled rice articles and by-products resulting from a 162 pound barrel of rough rice. The mill would deduct from this gross figure the conversion charge, this conversion figure including the mills expense for processing the rough rice, and the estimated profit. Assuming that this conversion would be 60c per barrel, the mill would then bid the producer $5.06, less the 60c conversion, or $4.46 per barrel for the rough rice. The affiants solemnly swear that they have used and seen records of various rice mills establishing the basis as outlined above.

Competitive Bidding Basis after the Processing Tax Law requiring Payment of a Processing Tax in Cash: Since the beginning of the 1933 crop movement, which become available for market during the month of July, and on which the processing tax applies, the rice millers use the same basis to determine values; however, in addition to deducting the conversion charge, the rice millers deduct also the 1c per pound processing tax on the rough rice, or $1.62 per barrel, and submits his bid to the producer, less this deduction, as follows:

From the value of the same lot of rough rice as above illustrated, estimated to produce milled rice and by-products with gross values of $5.06 per barrel, the rice miller deducts the following: Conversion 60c and processing tax $1.62, or a total of $2.22 per barrel, and makes bid to the producer of $2.84 per barrel for that particular lot of rough rice.

The affiants further solemnly swear that in their practical experience they have prepared, and have seen prepared profit and loss statements for certain given periods other than the entire season; further that these profit and loss statements are prepared on particular

lots of rice, which is essential and necessary in their accounting procedure. Should the Agricultural Adjustment Act be held unconstitutional, the affiants state that the rice processors should enjoy the remedy and benefits given by Section 21 (d) of the said Agricultural Adjustment Act, as amended August 27th, 1935, because the records of buying processing and selling kept by the rice mills are adequate enough to properly allocate the cost of various grades of milled rice and its by-products, resulting from the processing of the rough rice; also to properly allocate in this cost, the processing tax, proportionately to the various grades of each lot of milled rice sold by itself alone or mixed. The greater portion of the milled rice sales are straight mill run lots without blending.

The affiants further solemnly swear that they have kept or have seen rice millers' records which reflect correct cost of production, profits from sales, etc., properly allocated to milled rice of various varieties, and grades, and by-products, and similarly allocated as to profits in selling prices, and should the Agricultural Adjustment Act be proven unconstitutional, each rice processor has sufficient records to enable him to recover in accordance with Section 21 (d) of the Agricultural Adjustment Act, as amended.

Summed up, the introduction of the rice processing tax has in no wise altered the customary manner or procedure followed by the rice milling industry in conducting their business.

(Sgd.) L. J. BARTEL,
(Sgd.) R. F. GOULD,
(Sgd.) JAMES J. MAYER.

Subscribed and sworn to before me this 28th day of October, 1935.

(Sgd.) HOMER R. ROBINSON,
Deputy Collector.

DECREE.

Filed October 28, 1935.

(Title Omitted.)

This cause came on today to be heard upon the application of the plaintiff for a Preliminary Injunction, as well as upon the motion filed on behalf of the defendant to dismiss the bill of complaint, and was argued by counsel for the respective parties;

Whereupon, and upon consideration thereof, and for the reasons orally assigned;

It is Ordered, Adjudged and Decreed that the application for the Preliminary Injunction be and the same is hereby denied;

It is Further Ordered, Adjudged and Decreed that the plaintiff's petition and bill of complaint in all respects be dismissed.

(Signed) : JOHN McDUFFIE, Judge.

New Orleans, Louisiana, October 28, 1935.

MOTION FOR INJUNCTION PENDING APPEAL.

Filed Oct. 29, 1935.

(Title Omitted.)

Comes now the plaintiff in the above entitled and numbered cause and moves the Court to grant plaintiff an injunction pending appeal for the reason that, unless such injunction pending appeal is granted plaintiff,

plaintiff will be compelled to pay the taxes referred to in plaintiff's petition before plaintiff's appeal can be determined by the Circuit Court of Appeals, thus causing it great and irreparable injuries. Plaintiff offers to furnish good and sufficient bond by a solvent surety company in an amount to be fixed by the Court, if the Court should grant its prayer for injunction pending appeal.

MERRICK, SCHWARZ, GUSTE, BARNETT & REDMANN,
By MORRIS B. REDMANN,
Solicitors for Plaintiff.

Motion Denied.
(Signed) JOHN McDUFFIE, Judge.

MOTION OF PLAINTIFF FOR APPEAL AND ORDER ALLOWING SAME.

Filed October 29, 1935.

(Title Omitted.)

On motion of plaintiff in the above cause, and on suggesting to the Court that plaintiff is aggrieved by the decree entered by the Court herein on the 29th day of October, 1935, granting defendant's motion to dismiss, and that plaintiff desires to appeal therefrom with a supersedeas and a stay of proceedings in the District Court pending appeal to the United States Circuit Court of Appeals for the Fifth Circuit; and

On further suggesting to the Court that said decree is contrary to the law and the evidence for the reasons set forth in the assignment of errors filed in plaintiff's behalf herein; and

On further suggesting to the Court that this motion being filed in open Court on the entry of such decree and in the presence of counsel for defendant, no citation of appeal is necessary or need issue herein;

It is Ordered by the Court that the appeal of plaintiff from the decree entered herein to the United States Circuit Court of Appeals for the Fifth Circuit be and the same is hereby allowed with supersedeas; on appellant's furnishing bond with good and solvent surety, conditioned as required by law and to be approved by the Court in the sum of $250.00, said bond to act as a supersedeas, as well as a bond for costs and damages;

It is Further Ordered by the Court that the appeal of plaintiff from the decree entered herein be made returnable to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, on or before November 27, 1935, and that a certified copy of the record herein be transmitted to said Court of Appeals by the Clerk of this Court, and that no citation of appeal is necessary or need issue herein.

(Signed) JOHN McDUFFIE, Judge.

ASSIGNMENT OF ERRORS.

Filed October 29, 1935.

(Title Omitted.)

Comes now plaintiff and says that, in the record in the proceedings of the said Court in the above entitled cause and in the Decree made and entered therein on the 28th day of October, 1935, there is mani-

fest error and for error the said plaintiff assigns the following:

(1) The Court erred in sustaining defendant's motion to dismiss plaintiff's Bill of Complaint, because such action was contrary to the law and the evidence.

(2) The Court erred in over-ruling and not sustaining plaintiff's motion for a preliminary injunction because said ruling was contrary to the law and the evidence.

Wherefore, plaintiff prays that said Decree be, in all things, reversed, with instructions to the said District Court to grant plaintiff a preliminary injunction.

MERRICK, SCHWARZ, GUSTE,
BARNETT & REDMANN,
By MORRIS B. REDMANN,
Solicitors for Plaintiff.

APPEAL BOND.

Filed October 29, 1935.

Know all Men by these Presents, that we, Levy Rice Milling Company, Inc., as principal, and American Bonding Company of Baltimore, as surety, are held and firmly bound unto Rufus W. Fontenot, in the full sum of $250.00, to be paid to the said Rufus W. Fontenot, his attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents, sealed with our seals and dated this 29th day of October, 1935.

Whereas, lately, in the District Court of the United States for the Eastern District of Louisiana, judgment was rendered against Levy Rice Milling Company, Inc., and in favor of Rufus W. Fontenot, denying plaintiff's application for a Preliminary injunction and dismissing plaintiff's Bill of Complant, and the said Levy Rice Milling Company, Inc., having obtained an appeal to reverse said judgment, citing and admonishing the said Rufus W. Fontenot to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit to be holden at the city of New Orleans, La., in said Circuit Court on the 27th day of November, 1935.

Now the Condition of the above obligation is such that if the said Levy Rice Milling Company, Inc., shall prosecute its appeal to effect and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void, else to remain in full force and effect.

LEVY RICE MILLING COMPANY, INC.,
By JAKE LEVY, Pres.,
Principal,

AMERICAN BONDING COMPANY OF BALTIMORE,
By LOUIS M. BODENHEIMER,
Surety,

LOUIS M. BODENHEIMER,
(Seal) Atty. in Fact.

Approved October 29th, 1935.

(Signed) RUFUS E. FOSTER, Judge.

PRAECIPE.

Filed October 31, 1935.

(Title Omitted.)

To the Honorable H. J. Carter, Clerk of the United States District Court for the Eastern District of Louisiana:

You will please include in the record upon appeal in the above entitled cause the following documents and procedures:

1. Plaintiff's original bill of complaint.

2. Defendant's motion to dismiss and answer.

3. Order of Court consolidating causes for trial and providing for evidence in cause No. 324 in Equity, Baton Rouge Rice Mill, Inc., vs. Rufus W. Fontenot, etc., to be considered as evidence in this cause.

4. Affidavit of W. M. Reid.

5. Affidavit of Homer L. Bruce.

6. Joint affidavit of L. J. Bartel, R. F. Gould and J. J. Mayer.

7. Decree of the District Court.

8. Plaintiff's motion for injunction pending appeal and order denying same.

9. Motion and order for appeal.

10. Plaintiff's assignment of error.

11. Appeal Bond.

12. This Praecipe.

13. Clerk's certificate.

(Sgd.) MERRICK, SCHWARZ, GUSTE, BARNETT & REDMANN,
Attorneys for Plaintiff and Appellant.

Approved:
(Signed) ROBERT WEINSTEIN,
Asst. U. S. Attorney, Counsel for Defendant.

Clerk's Office:

I, HENRY J. CARTER, Clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify that the foregoing 34 pages contain and form a full, true and complete transcript of the record, assignment of errors and all proceedings in the cause entitled "Levy Rice Milling Co., Inc., vs. Rufus W. Fontenot, Individually and as Collector of Internal Revenue for the District of Louisiana," No. 326 In Equity of the Docket of this Court, as made up in accordance with the Praecipe for Transcript copied herein.

Witness my Hand and the seal of the said Court at the City of New Orleans, La., this 2nd day of November, A. D. 1935.

(Seal) H. J. CARTER, Clerk,

By H. W. NIEHUES,
Deputy Clerk.

[fol. 45] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AT NEW ORLEANS, LOUISIANA

No. 7949

LEVY RICE MILLING COMPANY, INC., Appellant,

v.

RUFUS W. FONTENOT, Individually and as Acting United States Collector of Internal Revenue for the District of Louisiana, Appellee

MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL—Filed November 5, 1935

Comes now the Levy Rice Milling Company, Inc., appellant in the above numbered and entitled cause, and after due notice given to the appellee above named, respectfully states to the Court that the said appellant on the 28th day of October, 1935, brought a bill in equity in the United States District Court for the Eastern District of Louisiana, New Orleans Division, entitled Levy Rice Milling Company, Inc., plaintiff, v. Rufus W. Fontenot, individually and as Acting United States Collector of Internal Revenue for the District of Louisiana, defendant, and numbered 326 in equity, in the New Orleans Division of said United States District Court. In its bill of complaint in said cause appellant prayed for a temporary restraining order to be issued [fol. 46] immediately, and for a preliminary injunction after notice to the appellee, and for a permanent injunction on the final hearing of said cause, enjoining the appellee from assessing or collecting or attempting to assess or collect from the appellant in any manner whatsoever, whether by lien or jeopardy or distraint proceedings, in court or otherwise, any processing taxes levied under and pursuant to the Act of the Congress of the United States known as the Agricultural Adjustment Act and amendments thereto, or purported to be levied by said Act, upon the appellant for the processing of rice during the month of September, 1935, and for subsequent months, and any interest or penalty on account of appellant's failure to pay said processing tax, and from imposing or giving notice of intention to impose any lien for said taxes upon the property,

real or personal, of appellant. That said application for a preliminary injunction was set down for hearing before the Judge of said District Court at New Orleans on Monday, October 28, 1935. The notice thereof was duly waived by the appellee. Prior to said hearing the said appellee filed his motion to dismiss and answer to said bill of complaint, copies of which motion and also of appellant's bill of complaint are contained in the record in this cause filed in this Court.

After a hearing had on appellant's motion for a preliminary injunction and on the said motion to dismiss, the Honorable John McDuffie, acting judge of said District Court on October 28, 1935, refused appellant's motion for a preliminary injunction, granted the motion of the appellee to dismiss the said bill of complaint and dismissed the said bill of complaint, to which appellant herein duly excepted. [fol. 47] Thereafter, on the 29th day of October, 1935, the appellant herein in open court and in the presence of counsel for appellee filed its petition for an appeal, which was duly allowed by the said judge of the said United States District Court who tried said cause, and filed at the same time its assignments of errors, and also a cost bond was duly filed and approved by the said judge of said District Court. At the time appellant presented its said petition for appeal, it also petitioned said judge of the District Court to grant it an injunction enjoining the appellee in the manner set out in its request for a preliminary injunction in its bill of complaint, pending the appeal of appellant to this Honorable Court, but the said judge of said District Court on October 29, 1935, refused appellant's said petition and refused to grant appellant said injunction pending said appeal.

Appellant has therefore perfected its appeal to the Circuit Court of Appeals for the Fifth Circuit, making said cause returnable at New Orleans, Louisiana, as provided by law. Appellant has duly caused to be prepared a transcript of the record in said cause and has filed the same, in accordance with law, and within the time allowed by law, in the Clerk's office in the Circuit Court of Appeals at New Orleans, Louisiana.

In said bill of complaint appellant alleged that the amount of processing taxes on account of the rice processed by the appellant during the month of September, 1935, was $17,721.23, and that under said Agricultural Adjustment

Act appellant was required to pay said amount to appellee on or before October 30, 1935, and that appellee was charged with the duty of collecting said tax, and if said tax [fol. 48] were not paid on or before October 30, 1935, appellee would assess said tax against the appellant and serve upon appellant notice and demand for the payment thereof and would allow appellant ten days from receipt of such notice within which to pay the same; that in the event said tax should not be paid within said time, appellee would assess against appellant a penalty equal to 5% of the amount of the tax and interest on the tax at the rate of 1% per month from the due date of the tax until paid; that if the appellant failed to pay the tax within said ten days, appellee would proceed to collect the tax, penalty and interest by filing a notice of lien on all of appellant's property and by distraining upon and selling such of appellant's property as might be necessary to realize the amount of said tax, penalties and interest; and that additional processing taxes for months subsequent to September, 1935, will accrue and be assessed against and collected from the appellant in the same manner as the tax for the month of September.

Appellant alleged that the said processing tax was illegal and unconstitutional, and violated various provisions of the Constitution of the United States in many particulars, more fully set forth in appellant's bill of complaint. The appellant also alleged that under an amendment to said Agricultural Adjustment Act approved on August 24, 1935, a Section 21 (d) was added to said Act, which section provides in substance that appellant should be allowed no recovery of any of said taxes paid, if the same should be illegal or unauthorized, unless appellant established to the satisfaction of the Commissioner of Internal Revenue, and [fol. 49] the Commissioner should so find, that neither appellant nor any person directly or indirectly under appellant's control or having control over appellant, has, directly or indirectly, included such amount in the price of the rice with respect to which it was imposed or of any article processed from the rice with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing rice, and that the price paid by the appellant or such person for said rice was not reduced by any part of such amount. Appel-

lant in said bill of complaint, alleged, as more fully set out in said bill of complaint, that under said Section 21 (d) it had no adequate remedy at law by which it could recover any part of said taxes if same were unconstitutional and illegal, and that it was impossible, owing to the peculiar conditions existing in the rice milling industry and in the purchase, milling and sale of rice, for appellant to discharge the burden placed upon it by said Section 21 (d), all as more fully set out in appellant's bill of complaint.

Appellant further alleged that in said amendment of August 24, 1935, a new section known as Section 21 (a) was added to said Agricultural Adjustment Act, which in substance provided that no suit to enjoin the collection of said processing taxes should be maintained in any court. Appellant further alleged that said section was not intended to apply, and did not apply, to the injunction prayed for by appellant, inasmuch as appellant had no adequate remedy at law. Appellant further alleged that if said section should be interpreted as prohibiting the injunction [fol. 50] prayed for by appellant, then the said section, together with the other provisions of said Act, was invalid and in violation of the Fifth Amendment to the Constitution, that no person shall be deprived of his property without due process of law, in that said illegal and unconstitutional taxes would be collected from appellant and appellant would have no remedy by which he could recover taxes and would have no remedy to prevent the collection of said unlawful taxes and would be forever deprived of the right to test the constitutionality of said taxes.

Appellant further alleged that said Section 21 (d) denied the appellant a complete and adequate remedy at law for the various other reasons set forth in said bill of complaint.

At the hearing before the District Judge appellant introduced in evidence the affidavit of W. M. Reid, Executive Secretary of The Rice Millers Association, a man of twenty-six years experience in the rice business, in which affidavit he set out fully and in detail the methods of conducting the rice business and the manner in which the rough rice market and the clean rice market is made, showing that it would be utterly impossible for any rice miller to accurately determine whether he had made a profit or a loss on any given transaction, much less prove whether he had passed the tax, or any part thereof, on. Appellant also introduced in evi-

dence the affidavit of Homer L. Bruce, a practicing attorney at the bar at Houston, Texas, setting out in detail the proceedings under a complaint brought by the Secretary of Agriculture to revoke the license of a rice mill under the Act in effect prior to the present Act. The Secretary of Agriculture sought to revoke the license of this mill for [fol. 51] failure to sell clean rice and rice products processed from rough rice at a price approximately 79c higher than the price paid for the rough rice. The affidavit showed that although the Government was able to prove the cost of the rough rice and to trace the particular rough rice into various "mixes" of clean rice and the price procured for these "mixes" of clean rice it was never able to prove that the price procured for the clean rice processed from the particular lot of rough rice was not 79c more than the price paid for the rough rice because of the fact that clean rice is customarily sold in "mixes" of various lots of rice and there was no way to allocate the price procured for the mixed rice sold to the various lots of rough rice which went into the mix.

In the meantime, appellant alleges that for the foregoing reasons and those set forth in its said bill of complaint in said cause, and because the judge of said court in his said order dismissed said bill of complaint and refused to grant appellant the injunction prayed for pending the appeal in this case, the appellee herein will, to the irreparable damage and loss of the appellant herein, proceed to collect the said taxes for September, 1935, which are now due and unpaid, from appellant, and said taxes for subsequent months, unless restrained by a preliminary injunction granted by this court. The appellant alleges that not only has it no complete remedy at law, but in fact no remedy at law at all, for the reasons hereinabove set forth and set forth more in detail in said bill of complaint, that it is faced with the alternative of paying the tax with the certainty that no remedy at law exists for its recovery in case it be held that [fol. 52] it was unconstitutionally assessed, or of refusing to pay and running the risk of becoming liable for the heavy civil and criminal penalties provided in the Act, and that the said judge of said District Court should not have dismissed said bill of complaint, but should have overruled the same, and upon the hearing should have granted the preliminary injunction as prayed for in said bill of complaint.

Appellant would further show that there is now pending in the Supreme Court of the United States a case involving the constitutionality of the said Agricultural Adjustment Act, being the same case in which the Circuit Court of Appeals for the First Circuit declared the Act to be unconstitutional, and that the Supreme Court, according to press dispatches, has set said cause for oral argument on Monday, December 9, 1935; that a decision by the Supreme Court of the United States upon the validity of the said Act may be expected within a reasonable time thereafter; that the first benefit payment to farmers provided for in said Act has been made, and that under the standard form of contract between the Secretary of Agriculture and rice farmers no further payment is due until such time after December 1, 1935, as the Secretary shall determine and declare what further amount of benefit payments shall be made and when they shall be made; that the taxes to be collected under said Act are for the purpose of making these benefit payments and that since the Secretary of Agriculture need make no further benefit payments until such time after December 1, 1935, as may be fixed by him, the delay of the Government in collecting these taxes which might be occasioned by the granting of the injunction [fol. 53] prayed for herein will not occasion any injury to the Government nor will it unduly interfere with the achievement of the program set out in said Act if the Act be held constitutional. On the other hand, as hereinabove alleged, great and irreparable damage will be done to plaintiff in the event the law is held unconstitutional unless the injunction hereinafter prayed for is granted.

Appellant further shows that unless an injunction pending appeal be granted so as to preserve the status quo, the subject-matter of the suit will be lost and the jurisdiction of this Honorable Court defeated. Such injunction is necessary to preserve the jurisdiction of this Honorable Court, and in order that appellant may enjoy the just fruits of a favorable decision on this appeal.

The appellant states that it is ready and willing to give any reasonable bond or other security that may be required by any order of this Court, including the deposit from month to month of the amount of tax due, in a depository to be designated by the court, and therefore prays that this Court make an order granting appellant a preliminary in-

junction enjoining and restraining the appellee from assessing or collecting or attempting to assess or collect from appellant in any manner whatsoever, whether by lien or jeopardy or by distraint proceedings, in court or otherwise, the said processing taxes for the month of September and subsequent months and any other processing taxes under and pursuant to said Agricultural Adjustment Act upon rice processed by appellant, and any interest or penalty on account of appellant's failure to pay said processing taxes, and from imposing or giving notice of intention [fol. 54] to impose any lien for said taxes upon the property, real or personal of the appellant, pending the hearing of appellant's appeal in this case and upon such conditions and terms as to this Court may seem just.

(Original signed) M. B. Redmann.

Merrick, Schwarz, Guste, Barnett & Redmann, of Counsel.

[fol. 55] *Duly sworn to by M. B. Redmann. Jurat omitted in printing.*

[fol. 56] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Motion for Preliminary Injunction Pending Appeal—November 5, 1935.

Upon the authority of Rickert Rice Milling Company, Inc., vs. Rufus W. Fontenot, etc., the application for injunction in the above numbered and entitled case is denied.

[fol. 57] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7937

RICKERT RICE MILLING COMPANY, INC., Appellant,

versus

RUFUS W. FONTENOT, Acting Collector of Internal Revenue, Appellee

Appeal from the District Court of the United States for the Eastern District of Louisiana

Motion for Preliminary Injunction Pending Appeal

Before Foster and Sibley, Circuit Judges, and Strum, District Judge

OPINION—November 5, 1935

By the COURT:

On consideration of the application for an injunction to stay collection of taxes levied under the provisions of the Agricultural Adjustment Act, as amended by the Act of August 24, 1935, the Court is of the opinion that the taxpayer has a remedy at law to recover back any taxes illegally [fol. 58] exacted and, further, that the provisions of the Act as amended deprive the Court of jurisdiction to grant injunctive relief.

It is ordered that the application be denied.

[fol. 59] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 60] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 25, 1935.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is assigned for argument on Monday, December 16, next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 40,139. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 585. Levy Rice Milling Co., Inc., Petitioner, vs. Rufus W. Fontenot, Individually and as Acting United States Collector of Internal Revenue for the District of Louisiana. Petition for a writ of certiorari and exhibit thereto. Filed November 14, 1935. Term No. 585, O. T., 1935.

(7185-C)